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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re Marriage of DALE and BARRY SIEGEL. _____ DALE SIEGEL, Plaintiff and Appellant, v. BARRY SIEGEL, Defendant and Respondent.	B204467 (Los Angeles County Super. Ct. No. D229359)

APPEAL from an order of the Superior Court of Los Angeles County. William D. Stewart, Judge. Reversed and remanded.

Lipton & Margolin, Hugh A. Lipton; Law Offices of Robert L. Schibel and Robert L. Schibel, for Plaintiff and Appellant.

Law Offices of Paula Kane, Paula Kane; and Gary J. Cohen, for Defendant and Respondent.

Dale Siegel (Dale) appeals an order that modifies and eventually terminates the spousal support obligation of her ex-husband, Barry Siegel (Barry). According to Dale, the modification and termination were improper because there was no change of circumstances. In particular, she contends that the trial court abused its discretion by entering a step-down order regarding her spousal support, by making the support modification retroactive, and by ordering jurisdiction to terminate on September 30, 2009, even though case law advises that jurisdiction should be retained when the marriage was long in duration. We reverse and remand for further proceedings because the family court failed to consider the parties' stipulated judgment and all statutory factors when entering the step-down order, and because the circumstances do not support termination of jurisdiction at this time.

FACTS

The marriage and dissolution

Dale and Barry were married in 1969. She did not work during the marriage. They separated in November 1988, when Dale was 38 years old. After she filed for divorce, a stipulated judgment was entered on August 6, 1992. Barry was ordered to pay $10,000 a month in spousal support for the first year, and then to increase the payments to $10,833.53 a month. The stipulated judgment provided that Dale would receive this support until she remarried or it was modified in court.

Barry's first attempt to modify or terminate spousal support

On January 12, 2005, Barry filed an application for an order to show cause why his spousal support obligation should not be terminated or modified. The application advised Dale that, pursuant to Family Code section 4330, subdivision (b),[1] "[i]t is the goal of this state that each party shall make reasonable good faith efforts to become self supporting as provided for in Section 4320. The failure to make reasonable good faith efforts may be one of the factors considered by the Court as a basis for modifying or

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[1] All further statutory references are to the Family Code unless otherwise indicated.

terminating support."[2] In his income and expense declaration, Barry reported gross monthly wages of $75,557. He attested that he earned an additional $10,000 a month from self-employment.

Barry declared that Dale did not have a college education when they divorced. Subsequently, she obtained a master's degree in psychology and gained the skills necessary to work full-time. A vocational counselor, Paulette Hunnewell (Hunnewell), opined the Dale was capable of earning $43,500 a year as an unlicensed professional in the mental health field, and $51,000 to $58,000 a year as a licensed marriage and family therapist.

In Dale's responsive papers, she represented that her monthly income, excluding spousal support, was $529.01. She claimed that her monthly expenses were $16,414.37. She asked the family court to increase her spousal support to $15,000 a month. According to Dale, Barry and she had a high standard of living during their marriage: she was a full time wife and mother; she had a full-time housekeeper; she shopped at nice stores; she drove a Cadillac Eldorado and then two Mercedes Benzes; they vacationed regularly and purchased luxury items; she purchased clothing all around the world; Barry's clients gave them expensive gifts; Barry billed many expenses to his clients; and they threw big parties and various celebrities attended those parties. Since the divorce, Barry's standard of living went up and hers went down.

Dale explained that to become self-supporting, she obtained a bachelor of arts equivalency, a master of arts in marriage, family and child counseling, and a certificate in chemical dependency counseling. In 1997, she enrolled in a doctor of psychology program and was working to complete it. She worked 3,000 intern hours required to be a marriage and family therapist. In order to obtain her license, she had to take an exam. She passed the written portion of the exam but failed the oral exam in 2003 and the clinical vignette in 2004 and 2005.

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[2] This is a codification of the warning that was enunciated by *In re Marriage of Gavron* (1988) 203 Cal.App.3d 705, 711 (*Gavron*).

Additionally, Dale detailed her medical history. In 1985, she was diagnosed with Epstein Barr virus. She was bedridden for about a year. She suffered from problems with light headedness, fainting and balance. In 1999, she had a hysterectomy and had benign tumors removed from her breast. In the same year, she broke her right ankle and needed several surgeries. Despite the surgeries, she developed chronic ankle and foot problems. She had a cancerous mole removed from her face in 2004. She expressed fear about her increasing medical expenses.

On October 17, 2005, the family court denied Barry's application. In its ruling, the family court explained that a spousal support order can be changed only if there is a material change in circumstances. However, Barry did not show a change of circumstances because Dale had never been given a *Gavron* warning to make a good faith effort to become self-sufficient. The family court denied Dale's application for an increase in spousal support.

Dale was given a *Gavron* warning.

Barry's second attempt to modify or terminate spousal support

Barry filed his second application January 2007. He argued that although Dale had been given a *Gavron* warning in October 2005, she failed to pursue her employment opportunities. According to Barry, Dale was still working eight hours a week as a therapist intern at Westminster Center Counseling despite having the ability to work full-time. Barry resubmitted Hunnewell's report and promised to have it updated.

Dr. Martin D. Levine filed a declaration in support of Barry's application. After conducting an independent examination of Dale, and after reviewing the reports of Dale's physicians, Dr. Levine opined "<u>that there is no objective basis to claim that [Dale] is precluded from working full time as a marriage [and] family counselor or in a similar sedentary position</u>."

Dale filed a report from her own vocational counselor, Lynne L. Tracy (Tracy). Because Dale reported various ailments and conditions and claimed that she could not work full-time, Tracy declined to give an opinion regarding Dale's employability without a report from her doctors. Tracy concluded that because Dale did not have a current

intern number, she had to reapply for a number. Until she obtained that number, the most she could earn was $35,000 a year. Further, because Dale failed the clinical vignette three times, Tracy questioned whether Dale had the ability to pass the marriage and family therapist exam.

In her responsive declaration, Dale disputed Hunnewell's conclusion that she was physically capable of working full-time, that she lacked motivation, and that there were appropriate jobs available. Dale explained that she has been pursuing definitive answers to "persistent health issues such as fainting, dizziness, imbalance, lightheadedness, chest pains, tiredness, numbing in hands and feet, and increased difficulty driving." She claimed that she continued to suffer from Chronic Fatigue Syndrome. In her income and expense declaration, Dale asserted that her average wages were $96.48 a month, and that she received $940.39 in 2006 from investment property. She listed her total monthly expenses as $13,450.57.

Three and a half weeks before the hearing, Dale obtained her license as a marriage and family therapist. Hunnewell submitted a declaration designed to respond to Dale's licensure. According to Hunnewell, there were four employers in the Los Angeles area with five immediate openings for which Dale was qualified. As an example, she could earn $49,642 to $61,675 annually working for the County of Los Angeles, Department of Mental Health as a mental health clinician. Once she obtained a few years of additional experience as a mental health clinician, she could make up to $76,428 annually working as a family therapist or child custody evaluator for the Los Angeles Superior Court.

The family court heard the case on July 25, 2007, and issued an order on October 15, 2007. The family court stated: Dr. Levine concluded that there is no objective basis to claim that Dale is precluded from working full-time. Dale "has been able to be gainfully employed full time prior to February 1, 2007[,] in various sedentary occupations as a marriage and family intern which do not involve significant risk from patients or the environment as delineated by [Hunnewell] at a rate of pay of $44,000 per annum." Dale "will be able to seek and within a reasonable period of time to locate an appropriate placement requiring the license which she has recently obtained. Such

employment will produce compensation at the rate of $51,000.00 per annum." Spousal support was reduced to $7,216.33, effective February 1, 2007. "Presumably [Barry] has made excess payments since February 1, [2007]; accordingly such total excess is to be divided by 18, and the quotient may be reduced from each of the ensuing support payments." The family court found that Dale "is reasonably likely to be able to transition to [making $51,000] by July 1, 2008; at that time and beginning the month of July, 2007, spousal support is to be reduced to the amount of $6,633.00 per month (adjusted for any overpayment amounts remaining to be accounted for.)" After 15 months, Barry's spousal support obligation will terminate. "This period of time is found by [the family court] to be appropriate for [Dale] to rearrange her affairs such that her lifestyle will be in accordance with her means as redetermined." The family court indicated that it would terminate jurisdiction on September 30, 2009.

The modification order was issued on October 15, 2007.

This timely appeal followed.

STANDARD OF REVIEW

We review a family court's order modifying a spousal support order under the deferential abuse of discretion standard. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 480 (*Smith*).) "In exercising its discretion the trial court must follow established legal principles and base its findings on substantial evidence. If the trial court conforms to these requirements its order will be upheld whether or not the appellate court agrees with it or would make the same order if it were a trial court." (*In re Marriage of Schmir* (2005) 134 Cal.App.4th 43, 47, fn. omitted (*Schmir*).)

DISCUSSION

1. The law governing spousal support.

In a judgment of dissolution of marriage, the family court may order the husband to pay support to the wife consistent with the requirements of section 4320. (§ 4330.)[3] Support is defined as the subsistence a person needs to live in the degree of comfort suitable and becoming to her station in life. It includes what is necessary for housing, feeding, clothing, proper recreation, vacation, travel expenses, and medical care. (*In re Marriage of Benjamins* (1994) 26 Cal.App.4th 423, 429.) Section 4320 sets forth factors for a family court to consider, such as the ability of the supporting spouse to pay and the needs of each party based on the marital standard of living. The marital standard of living "is not 'an absolute measure of reasonable need, but merely a "basis" or reference point for determining need and support.' [Citation.]" (*In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 207.) "[A]lthough the marital standard of living is an important factor in determining spousal support, it is not the only factor, and its importance in determining whether it is 'just and reasonable' (§ 4330) to award spousal support will vary based on the court's evaluation of the section 4320 factors." (*In re Marriage of Shaughnessy* (2006) 139 Cal.App.4th 1225, 1247 (*Shaughnessy*).)

The importance of the marital standard of living may be significant, such as in the context of a long marriage in which the wife did not work outside of the home. In that situation, the wife "not only failed to develop her own earning capacity, she . . . presumably contributed to the development of the husband's earning capacity. In many, if not in most, cases the established employment or earning capacity of the husband constitutes the most valuable economic asset of the parties. While this economic attribute is not of such a character as will permit its division as property [citation], it is not to be ignored in considering the problem of continuing support. [Citations.]" (*In re Marriage of Rosan* (1972) 24 Cal.App.3d 885, 898.) Certainly a "marriage license is not a ticket to

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[3] Though the award is within the family court's discretion, it must consider the factors set forth in section 4320.

a perpetual pension." (*In re Marriage of Brantner* (1977) 67 Cal.App.3d 416, 420.) Nonetheless, "in those cases in which it is the decision of the parties that the woman becomes the homemaker, the marriage is of substantial duration and at separation the wife is [for] all intents and purposes unemployable, the husband simply has to face up to the fact that his support responsibilities are going to be of extended duration—perhaps for life." (*Ibid*.) On the other hand, it may be appropriate for a family court to attribute less significance to the marital standard of living such as when a supporting spouse seeks a modification after a long period of support. (*In re Marriage of Rising* (1999) 76 Cal.App.4th 472, 478 (*Rising*).)

In appropriate cases, there are grounds for modifying or terminating a previous spousal support order.

When a party has or acquires a separate estate, including income from employment, sufficient for the party's proper support, "no support shall be ordered or continued against the other party" in a modification proceeding if there are no children. (§ 4322.) If the parties' children are no longer minors, they have "no children" for purposes of section 4322. (*Dallman v. Dallman* (1959) 170 Cal.App.2d 729, 733 [applying a predecessor to section 4322, the court stated that "[b]ecause the parties' children [have] reached majority before this suit was commenced, the case may be treated as one 'where there are no children'"].)

A spousal support order may be modified if there has been a material change of circumstances since the last order. (*Smith*, *supra*, 225 Cal.App.3d at p. 480.) A change of circumstances means a reduction or increase in the supporting spouse's ability to pay or an increase or decrease in the supported spouse's needs based on the standard of living established during the marriage. The family court should consider the obligations and assets of each party; the balance of hardships; the job skills of the supported spouse and the market for those skills; the duration of the marriage; the age and health of the parties; the goal that the supported party shall be self-supporting within a reasonable period of time; and any other equitable factor. (*In re Marriage of West* (2007) 152 Cal.App.4th 240, 246 (*West*); *In re Marriage of Bower* (2002) 96 Cal.App.4th 893, 899; § 4320,

subds. (a)-(n).) In particular, the ability of a supported spouse to become self-supporting may constitute a change of circumstances. (*Shaughnessy, supra,* 139 Cal.App.4th at p. 1238.) But if the record on appeal lacks substantial evidence of a material change of circumstances, a modification of a spousal support order will be overturned for an abuse of discretion. (*West, supra,* 152 Cal.App.4th at p. 246.)

When spousal support is modified down to zero, the impact can be lessened with a step-down order that decreases support over a period of time. A step-down order must "be based on reasonable inferences to be drawn from the evidence, not mere hopes or speculative expectations." (*West, supra,* 152 Cal.App.4th at p. 248.) "'Evidence in the record must support a reasonable inference that needs will be less with each step-down and that the spouse can realistically be self-supporting at the time nominal payments are set to begin.' [Citation.]" (*In re Marriage of Prietsch & Calhoun* (1987) 190 Cal.App.3d 645, 656.)

2. Propriety of a modification.

In stating the issues, Dale asks: "Was there a change in circumstances on which the [family] court could base a modification of spousal support[?]"[4] After reviewing the evidence, we conclude that there was a material change of circumstances permitting a modification.

In 1992, Dale did not have a college education. By the time the challenged order was entered in 2007, she obtained a masters of arts degree in marriage, family and child counseling and a license as a marriage and family therapist. Based on Hunnewell's declarations, there was substantial evidence that Dale could earn $43,500 a year as an unlicensed mental health professional and up to $61,675 a year as a licensed marriage and family therapist. Though Dale claimed that her ailments interfered with her ability to work, we must accept Dr. Levine's opinion otherwise. Thus, the evidence established

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[4] She additionally asked: "Should the [family court] have ordered a modification of Dale's spousal support at all[?]"

that Dale could earn a decent living. This constitutes a change of circumstances that decreased her need for spousal support.

But this does not end the story. "[I]n determining what constitutes a change in circumstances[,] the [family court] is bound to give effect to the intent and reasonable expectations of the parties as expressed" in any agreement that they executed to govern the dissolution. (*In re Marriage of Aninger* (1990) 220 Cal.App.3d 230, 238.) The stipulated judgment provided that Dale would receive $10,833.53 per month and that the support would "terminate upon [Barry's] death, [Dale's] remarriage, or further order of the court, whichever first occurs." The family court confirmed that "the amount of spousal support awarded to [Dale] herein is sufficient to meet [her] reasonable needs and to maintain the marital standard of living." We conclude that this agreement may well have given Dale a reasonable expectation that she would maintain the marital standard of living after dissolution.[5] Thus, before a family court modifies Barry's spousal support obligation, it should consider Dale's reasonable expectations when balancing the section 4320 factors.

There are, of course, competing considerations at play. California courts have declared that all supported spouses of dissolved marriages should, if possible, seek gainful employment. "'Limiting the duration of support so that both parties can develop their own lives, free from obligations to each other, is a commendable [judicial] goal.' [Citation.] And a spousal support order may, in a proper case, be fashioned so as to encourage such supportive self-reliance, and to discourage delay in preparation for or in seeking, or refusal of, available employment." (*In re Marriage of Richmond* (1980) 105 Cal.App.3d 352, 356.) Along the same lines, "[a] trial court acts within its discretion in

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5 This does not preclude the family court from deciding that the marital standard of living is no longer the proper measure of support. (*Rising*, *supra*, 76 Cal.App.4th at p. 478 [concluding that after an 18-year marriage and 13 years of support, the trial court did not abuse its discretion in determining that the supported spouse should receive less than necessary to maintain the marital standard of living.) It is simply an additional factor to consider.

denying spousal support where the supported spouse has failed to diligently seek employment sufficient to become self-supporting. [Citation.]" (*Shaughnessy, supra*, 139 Cal.App.4th at p. 1238.)

3. The step-down order.

Dale's proffered second issue on appeal is whether the family court "abuse[d] its discretion entering a step-down order of Dale's spousal support." As to this point, we find error.

For the step-down order to stand, the evidence had to support an inference that Dale's needs would decrease with each step-down and that she could realistically be self-supporting when support ceased. As well, it required a finding that it was either unnecessary or inappropriate for Dale to maintain the marital standard of living. The family court made no such finding. Therefore, while it was reasonable for the family court to infer that within 15 months Dale would be able to cover some of her reasonable expenses during her working years, it was speculative to infer that she would be able to cover all those expenses and maintain her marital standard of living, or that she could afford retirement and not be relegated to poverty. It was only in 2005, when she was in her mid 50's, that she was given a *Gavron* warning and informed that she was expected to become self-sufficient. Moreover, despite her education, there was no evidence she could maintain the marital standard of living on her own. Conversely, Barry can easily afford to pay spousal support.

We are mindful that our review is deferential, and that we cannot reverse unless the family court's decision veered from legal principles, or if its explicit and implied findings were not buttressed by substantial evidence. And, generally, the absence of a statement of decision means that we must conclude that the lower court made all findings necessary to support its order under any theory argued. But this is "merely a corollary to the general rule that an [order] is presumed to be correct and must be upheld in the absence of an affirmative showing of error. This presumption applies only on a silent record. [Citation.] In contrast, 'Where the record clearly demonstrates what the [family] court did, we will not presume something different.' [Citation.]" (*Border Business Park*,

Inc. v. City of San Diego (2006) 142 Cal.App.4th 1538, 1550.) The family court did not issue a statement of decision, but it did issue a detailed order setting forth its reasoning. Its reasoning does not pass scrutiny because it was based on only a few of the factors delineated in section 4320.

The family court noted that by 2005, Dale obtained a master's degree in family therapy but had not become licensed. She was working as a marriage and family therapist intern on a part-time basis, and she had enrolled in a doctoral program in psychology. Next, the family court summarized Barry's complaint that Dale failed to show "reasonable diligence in becoming self-supporting, both prior to and subsequent to the [*Gavron*] warning" and his allegation that Dale "has not been prudent with respect to the use of her marital assets in that she moved from Woodland Hills to Westwood Village, acquiring a larger mortgage in the move, and by using a portion of the $100,000.00 community property equalization payment from [Barry] to purchase a luxury automobile, and by unnecessarily acquiring an unauthorized and unnecessary insurance policy on the life of [Barry] when he was already providing same as required by the [stipulated judgment]."

According to the family court, Dale realized her goal of becoming a licensed marriage and family therapist and was "prepared and ready to move forward into available employment. [Barry's] vocational expert has located a variety of positions for which [Dale] is qualified and became qualified upon her licensure. Additionally, [Dale] has a number of specialty certifications which add to her attractiveness as a candidate for these positions, and the additional advantage of her maturity; although she is newly licensed, prospective clients are likely to be more readily forthcoming, frank and confident in entering a therapeutic relationship with her."

In dispensing with Dale's health related defense, the family court assessed the medical opinions offered by the parties. Dale's symptoms included bilateral carpal tunnel syndrome, tarsal tunnel syndrome, chronic fatigue syndrome, fainting spells, lower back and neck problems, migraine headache and recent knee surgery. But the family court accepted Dr. Levine's conclusion that Dale was not precluded from working full-

time as a marriage and family therapist. According to the family court, the medical reports from Dale's physicians were either equivocal and not entitled to much weight, or were not presented in a proper form.

Based on these findings and facts, the family court found that Dale could earn $51,000 a year within a reasonable time. It entered a step-down order and set jurisdiction to terminate on September 30, 2009. But the family court failed to critically evaluate all pertinent facts. It did not consider the extent to which "the earning capacity of each party was sufficient to maintain the standard of living established during the marriage;" (§ 4320, subd. (a)) the "needs of each party based on the standard of living established during the marriage;" (§ 4320, subd. (d)) the age of the parties; the immediate and specific tax consequences to each party; the balance of hardships; and other just and equitable factors. (§ 4320, subds. (a)-(n).) Clearly Dale cannot maintain the standard of living established during the marriage. And the family court did not, a la *Rising*, determine that a different measure of support was appropriate, so its reasoning is not apparent. Moreover, the family court did not consider how long Dale, a 56-year-old woman, can be expected to work and whether she could afford retirement. As a matter of justice and equity, the family court should have considered the parties reasonable expectations when they agreed to the stipulated judgment. Finally, the family court should have examined the balance of hardships, as required by statute. Barry lives a higher lifestyle than Dale and can afford support payments, so she is the only one at risk of hardship. We will not second guess the family court's conclusion that Dale can work full-time despite her ailments, but the analysis is not complete. Even if she can work now, how many good working years does she have left given her health? This is not an easy case, so these questions must be asked.

Barry, in essence, suggests that the family court's order was proper because "Dale ha[s] not pursued any full-time employment opportunities" and she "ha[s] drawn out the process of obtaining her [marriage and family therapist] license for 11 years." He relies on *Shaughnessy, In re Marriage of Sheridan* (1983) 140 Cal.App.3d 742 (*Sheridan*) and

In re Marriage of Schaffer (1999) 69 Cal.App.4th 801, 808 (*Schaffer*). But those cases hardly compel a rubber stamp.

The husband and wife in *Shaughnessy* separated in 1995 when the wife was 35 years old. In 2003, the family court entered an order dissolving their marriage, noted that the wife needed retraining to obtain marketable skills, and ordered the husband to pay $2,000 a month. In 2005, the family court entered a step-down order and terminated payments as of June 30, 2006, after expressly considering the section 4320 factors. In making this ruling, it found that even though the wife had been warned that she was expected to become self-supporting in seven years, she continued working in the floral business and claimed that she netted only $650 a month. She was 46 years old, received an annual gift of $20,000 from her parents, and held $500,000 in separate property investments. The *Shaughnessy* court affirmed. (*Shaughnessy*, *supra*, 139 Cal.App.4th at pp. 1231–1234.) It found ample evidence that the wife failed to diligently seek to become self-supporting, and that it was reasonable to find that she could earn $30,000 or more a year after the step-down. Further, because the husband and wife had been separated for 11 years, the family court could have reasonably concluded that the marital standard of living was "deserving of less weight in balancing the section 4320 factors. [Citation.]" (*Id.* at p. 1248.)

In *Sheridan*, the family court ordered husband to pay the wife $1,200 for five months and reserved jurisdiction. The family court limited the award to give the wife incentive to become self-supporting. After five years, the wife requested a modification extending spousal support payments. The wife was only 38, and she had not sought gainful employment, so the family court denied her request. The *Sheridan* court affirmed, finding that the family court did not abuse its discretion. (*Sheridan*, *supra*, 140 Cal.App.3d at pp. 744, 749.)

Schaffer involved a 24-year marriage. The family court awarded the wife $850 a month for the first year, $650 a month for the second year and reserved jurisdiction thereafter. At the time, the wife was 48 years old, had a master's degree in marriage, family and child counseling, and planned to get her Ph.D. in another two years. The

family court doubted that she had the emotional stability and self-control for social and counseling work, and suggested she was headed in the wrong direction. She was able to extend her support to 15 years through a series of modification hearings. During that time, she continued to pursue jobs doing social work. However, she quit one job because of stress and was dismissed from another job for inappropriately pursuing a grievance against a coworker. When she once again requested an extension of spousal support, her request was denied. (*Schaffer, supra,* 69 Cal.App.4th at p. 803.) In affirming, the court held that it was permissible to look at the wife's entire history. Though the general rule is that a family court can only consider whether there has been a change of circumstances since the previous order, this case presented unique facts requiring scrutiny of more than a limited window. (*Id*. at pp. 809–810.)

The distinctions are myriad. For starters, *Shaughnessy*, *Sheridan* and *Schaffer* did not involve executed agreements covering spousal support. Here, Barry and Dale executed a stipulated judgment. Though it stated that it was modifiable, it contemplated that spousal support would last until Dale remarried or Barry died. Further, the wives in *Shaughnessy*, *Sheridan* and *Schaffer* were younger than Dale and were warned from the outset that they needed to become self-supporting. They all had histories of either avoiding gainful employment or pursuing the wrong occupation over multiple years. In contrast, the most that can be said about Dale is that she did not seek gainful employment after that *Gavron* warning on October 15, 2005. But during that time she managed to obtain her license to be a marriage and family therapist and she pursued her psychology doctorate, all of which indicate that she was persevering in her attempt to start earning wages. Another distinction that stands out is the level of support. Dale's reasonable need for spousal support, as agreed by the parties and confirmed by the family court, was much higher than the spousal support awarded to the wives in *Shaughnessy*, *Sheridan* and *Schaffer*. As a consequence, it will be more difficult for Dale than them to fill the monetary void.

Reloading his arguments, Barry asks us to take stock of *Rising* and *Schmir* and find them analogous.

In *Rising*, the family court found a change of circumstances during a postjudgment order to show cause and lowered monthly support from $3,750 to $3,000. In a step-down order, the support was reduced to $2,000 after 11 months, and eventually to $1,500 a month. (*Rising*, *supra*, 76 Cal.App.4th at p. 473.) The appellate court noted that it would have affirmed if the family court immediately reduced payments to $1,500 a month. But because the family court did not state the reason for issuing a step-down order, the *Rising* court reversed. (*Id*. at p. 474.) If the family court had stated that it was "implementing the step-down to ease the impact of the decrease on the supported spouse," then the step-down order would be acceptable. (*Id*. at p. 478.) The family court concluded that it was not necessary or appropriate to award wife the amount of support required to maintain the marital standard of living. According to the *Rising* court, this was not an abuse of discretion. (*Id*. at pp. 478–479, fn. 9.)

Barry contends that the family court would have been justified in terminating spousal support in early 2008. Instead, the family court "ordered two reductions and then termination. In doing so, the [family court] adhered to the admonition in *Rising*, and explained how Dale's needs would be less at the initial reduction, and at the July 1, 2008, reduction. Then as suggested by the *Rising* opinion, the [family court] explained that it was in effect postponing termination '*to ease the impact of the decrease on the supported spouse*.'"

Rising is inapposite. Here, unlike in *Rising*, the family court did not expressly determine that maintaining the marital standard of living for Dale was either unnecessary or inappropriate. Thus, we do not know the family court's reasoning. Also, *Rising* did not involve a stipulated judgment that, though expressly modifiable, stated that support would continue until the wife remarried. In one aspect, however, we find *Rising* instructive. There, the court concluded that the case had to be reversed because the family court did not explain the reasoning behind the step-down order. We follow that lead and find that the family court's order must be reversed because it did not set forth its reason for relegating Dale to a life below the marital standard of living. Did the family court consider the stipulated judgment? Was it punishing Dale for failing to become self-

sufficient? How did it expect Dale to retire? While not dictating a particular outcome,[6] we require answers to these questions.

In *Schmir*, the facts were these. The parties were married in 1964 and separated in 1987. Their marriage was dissolved in 1989. Like here, the parties' dissolution was governed by an agreement that provided that the wife would receive spousal support until the death of either party, the wife's remarriage, or further order of the family court. The agreement did not provide the wife with a *Gavron* warning. (*Schmir*, *supra*, 134 Cal.App.4th at p. 46.) In 2003, the husband sought a modification on the grounds, inter alia, that wife had reached an age when she could draw on her IRA without penalty, and there had been a reduction in her unreimbursed medical expenses. The family court ordered the support reduced to $2,000 a month on an interim basis. After discovery and after the wife underwent two vocational examinations, the family court held a hearing. It found that the wife was capable of obtaining employment as a licensed clinical social worker at a gross salary of $2,500 a month; she could draw without penalty from an IRA which had a substantial value; and her medical expenses had dropped from $2,000 to $500 a month. Based on these findings, the family court reduced the wife's support to zero the following month. (*Id*. at pp. 46–47.)

The wife appealed an order terminating her monthly spousal support payment of $5,800. The court found that there was substantial evidence to justify terminating spousal support, "but that the [family] court abused its discretion in doing it so abruptly as to deny [the wife] reasonable notice and an opportunity to find a job." (*Schmir*, *supra*, 134 Cal.App.4th at p. 46.) Though the wife should have been given an adjustment period, the court reasoned that the loss of spousal support would "not require her to make a significant incursion into the principal of her retirement account in order to compensate for the lost income. By paying off her $11,000 mortgage out of her retirement account

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6 In other words, we do not hold that Dale is entitled to maintain the marital standard of living. Rather, we require a more complete analysis before that standard is deemed inappropriate.

(which [the wife] could do without a substantial effect on her interest earnings) and by ceasing to make further contributions to the retirement account, [the wife] would save approximately $1,300 a month. The [family] court found [the wife] could reasonably earn $2,500 a month as [a licensed clinical social worker] leaving a gap of $2,000. A 4.5 percent rate of return on her . . . IRA would allow [the wife] to make withdrawals of $2,200 per month without reducing the principal." (*Id*. at pp. 52–53.)

Based on *Schmir*, Barry concludes that "Dale [has] been given advance notice and [an] opportunity to secure employment in 2005. Thus, Dale had been afforded enough time to update her resume and go on job interviews. Consequently, there was no practical reason to delay termination of Dale's support except for the reason given by the [family court]: to give Dale time to 'transition from dependency to self support' and to 'rearrange her affairs such that her lifestyle will be in accordance with her means." According to Barry, the 2007 modification order "represents a logical reaction to the Court of Appeal opinions in *Rising* and *Schmir*, and clearly does not suffer from either of the infirmities that led to reversal in those cases."

We disagree with Barry's assessment. In *Schmir*, there was evidence that the wife would be able to supplement the lost spousal support payments. There was no such evidence presented in the case at bar. As a result, an analogy to *Schmir* does not hold. Once again, we find that the family court's analysis lacked sufficient detail to explain why Dale's standard of living should plummet.

Finally, citing to *Smith*, Barry contends that maintaining the marital standard of living need not be maintained. In wrestling with this issue, *Smith* considered former section 4801, which was continued without substantive change in section 4330 (providing for support based on the marital standard of living) through section 4339. The statute did not make "the actual marital standard of living an absolute measure of reasonable need, but merely a 'basis' or reference point for determining need and support. In effect, the amended statute incorporates the 'prior case law consensus that the marital standard of living should be used as a *point of reference* in the court's weighing process.' [Citation.]" (*Smith*, *supra*, 225 Cal.App.3d at p. 484.) In reaching this conclusion, the

court quoted a letter from the author of the bill as stating that it "'establishes the marital standard of living as the starting point for spousal support determinations . . . . [The bill] does not, and is not, intended to establish the marital standard of living as a mandatory "floor" or "ceiling" for a spousal support award. It does not eliminate judicial discretion to award spousal support in amounts greater or less than the marital standard of living based on the [statutory] factors.'" (*Smith*, *supra*, 225 Cal.App.3d at pp. 484–485.)

We have no quarrel with *Smith*. Indeed, it dovetails with our understanding of the law. But we cannot be satisfied that, on this record, the family court took all the necessary factors into consideration.

Given Dale's current earning capacity, some type of modification appears to be appropriate. But the step-down order was an abuse of discretion because the family court did not consider all the section 4320 factors, and it did not analyze the parties' reasonable expectations based on the language in the stipulated judgment suggesting that support would continue until Dale remarried. Instead, the family court reduced Dale's support and then ordered the support to terminate in September 2009 despite her continuing needs. The family court did not expressly determine whether the marital standard of living had ceased to be a necessary or appropriate consideration when ruling. As a result, the issue of modification must be remanded for a more full and complete consideration by the family court.

4. The retroactivity of the family court's order.

The family court ordered Barry's support payments offset by the amount he paid in excess of $7,216.33 each month between February 1, 2007, and the date of the step-down order. This was proper.

A modification order may be made retroactive to the date of filing of an order to show cause to modify or terminate spousal support. (§ 3653, subd. (a).) If an order decreasing support is entered retroactively, the supported spouse may be ordered to repay the overage through, inter alia, an offset against future support payments. The family court should consider the amount to be repaid, the duration of the support order prior to

modification or termination, the financial impact on the supported spouse, and any other facts deemed relevant. (§ 3653, subd. (d).)

In general, a family court's "exercise of its discretion regarding retroactivity . . . must be guided by two overriding concerns: the supported spouse's need and the supporting spouse's ability to pay." (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 312 [considering a retroactive increase]; *In re Marriage of Jacobs* (1981) 126 Cal.App.3d 832, 836 ["the trial court should tailor its award on the basis of the equitable rights of the parties in light of their economic needs and abilities at the various times of the wife's employment and unemployment"].) Regarding need, income may be imputed to a supported spouse based on her earning capacity if she has the ability to work and there are employers who would be willing to hire her. (*In re Marriage of Ackerman, supra,* 146 Cal.App.4th at p. 213; *In re Marriage of LaBass & Munsee* (1997) 56 Cal.App.4th 1331, 1338 [permitting a court to impute income to a parent for purposes of determining child support].)

The family court concluded that Dale could have been earning $44,000 a year as of February 1, 2007. This was supported by the evidence provided by Hunnewell and Dr. Levine. As a result, the record shows that Dale could have subsisted on $7,216.33 a month from February 1, 2007, to the date of the step-down order. The family court did not abuse its discretion.[7]

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[7] Though we conclude that it was proper for the family court to make its order retroactive, the amounts subject to any retroactive order issued after remand may have to be recalculated.

5. Termination of jurisdiction.

Our Supreme Court instructs that a family court "should not terminate jurisdiction to extend a future support order after a lengthy marriage, unless the record clearly indicates that the supported spouse will be able to adequately meet his or her financial needs at the time selected for termination of jurisdiction." (*In re Marriage of Morrison* (1978) 20 Cal.3d 437, 453.) A family court is proscribed from speculating what the future might hold for the supported spouse. In the absence of evidence that the supported spouse can meet her future needs, "the court should not 'burn its bridges' and fail to retain jurisdiction." (*Ibid*.)

The family court did not find that it was appropriate for Dale's standard of living to decrease, and we will not presume such a finding for purposes of this opinion. In view of this, we note that there was no evidence that Dale could meet her current and future needs without some level of spousal support. In 1992, the parties stipulated that she was entitled to $10,833.53 after the first year of payments. In 2007, she filed an income and expense report indicating that she had $13,450.57 in monthly expenses. Even if Dale eventually earned as much as $76,428 a year (as projected by Hunnewell), Dale would only receive $6,375 a month before taxes and other deductions. This would leave her with about a $7,000 shortfall. The family court found that within a reasonable period of time Dale would be earning $51,000 a year, which equates to $4,250 a month. This would leave her with about a $9,000 shortfall. Though she listed her total estate as worth $835,800, that included her residence, and she only had a minimal income of $940.39 from investments in 2006. Further, the family court was required to consider Dale's age under section 4330. There was no evidence that she was capable of building a sufficient retirement fund so that she could retire. These considerations lead us to conclude that the family court erred when it ordered that jurisdiction be terminated on September 30, 2009.

This opinion is not designed to tie the family court's hands on remand. Indeed, there is an array of new rulings that would be within the family court's discretion after a new hearing is held. But the family court should not terminate jurisdiction until it

determines what standard of living is appropriate for Dale, and whether she might need a modification in the future.

DISPOSITION

The order is reversed and remanded for a rehearing.

Dale is entitled to her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ